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No. 734

In the United States Court of Appeals

For the Seventh Circuit

No. 11989

CHARLES R. HARD,
Petitioner,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

Petition for Review of an Order of the Civil Aeronautics Board.

APPENDIX FOR PETITIONER.

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APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHARLES R. HARD, Petitioner
vs.
CIVIL AERONAUTICS BOARD, Respondent
No. 11989

PETITION FOR REVIEW.

The Petitioner, Charles R. Hard, by his Attorney George F. Archer, respectfully presents this Petition for Review of an Order No. S-779 of the Respondent, Civil Aeronautics Board, dated February 6, 1957, and states:

I.

Nature of the Proceedings as to Which Review is Sought.

1. On February 7, 1956, Petitioner Charles R. Hard while captain-in-command of Eastern Air Lines Trip 156, a Martin 404 engaged in air commerce between Evansville, Indiana and Owensboro, Kentucky was involved in an accident at the Owensboro Airport in which the aircraft was damaged but in which there were no personal injuries.

2. On March 8, 1956, the Administrator of Aeronautics alleging authority under the emergency clause of Section 609 of the Civil Aeronautics Act, as amended, 52 Stat. 1011, 49 U.S.C. 559, suspended Petitioner's Airline Transport Pilot Certificate for a period of thirty days on the grounds that the Owensboro incident disclosed facts which revealed Petitioner lacked competency and judgment necessary for an Airline Transport Pilot Certificate. This suspension was renewed for an addi-

tional thirty day period up to and including May 7, 1956.

3. On March 16, 1956, the Administrator again alleging jurisdiction under Section 609 of the Act filed a Complaint with the Civil Aeronautics Board, requesting that the Petitioner's Airline Transport Pilot Certificate be revoked or suspended for lack of qualification.

4. On March 22, 1956, Respondent, through its Bureau of Safety Investigation, under authority of Subchapter 7 of the Act, 64 Stat. 972, 49 U.S.C. 581, 582, held public hearings and took testimony of witnesses including that of the Petitioner.

5. On April 4, 1956, Petitioner Hard answered the Administrator's Complaint and concurrently filed a Motion to Dismiss on the grounds that:

a. On March 3, 196, Petitioner Hard was given a thorough check ride in a Martin 404 by one Burt Poe, Eastern Air Lines Check Pilot, and certified and designated by the C.A.A. to give such instrument check rides and examinations for proficiency, and that on March 4, 1956, Petitioner Hard was given a six months proficiency instrument check ride test and examination by Poe and was at the same time checked by the C.A.A. Safety Agent, William Feast, who passed Hard as to all qualifications including judgment.

b. The Administrator had misconceived his action and was, in fact, arbitrarily using a remedial statute to invoke a penalty. Petitioner requested that if the Motion to Dismiss were denied that it be certified by the C.A.B. Examiner directly to the Board.

6. On April 6, 1956, the Motion to Dismiss was denied by the Respondent's Hearing Examiner on the grounds that:

"It appearing that the first ground of Respondent's motion is not a basis for a motion to dismiss but is rather appropriate for defense upon the merits, and that the second ground is inconsistent with the

Board's safety enforcement proceeding practice since the earliest reported case as an objection to procedure and an issue for trial upon the merits in substance."

7. The request to certify the question to the Board was denied.

8. On April 26, 1956, the C.A.B. Examiner held a trial on the merits of the issues formed by the Complaint and Answer.

9. The Examiner found that the "emergency suspension" was in the public interest but found no violation of any rule, regulation or statute; that there was no further need for examining Petitioner's qualification as an airline captain; that the "emergency suspension" be terminated effective May 7 (the date which the second suspension period would have expired in any event), whereupon Petitioner resumed his status as an Airline Transport Pilot with Eastern Air Lines.

10. On June 1, 1956, the Administrator appealed this decision asking the Board to find that the Petitioner violated certain Civil Aeronautics Regulations and that he demonstrated a lack of the degree, care, skill, and responsibility required of a holder of an Airline Transport Pilot Rating and requested that Petitioner Hard's A.T.R. be revoked because of lack of qualification.

11. Petitioner Hard thereupon prayed to the Board that the Initial Decision of the Examiner be sustained and his proposed findings and conclusions be adopted, but excepting that part of the Initial Decision known as Findings IV and VII referring to the approach pattern of Flight 156 to the Owensboro Airport.

12. On July 5, 1956, the Respondent, Civil Aeronautics Board, issued its Accident Investigation Report on the February 7, 1956 Owensboro incident.

13. On February 6, 1957, the Respondent, Civil Aeronautics Board, issued a decision on the case ordering

(Order No. S-779) a six months suspension (giving credit for the 60 days which Hard had been suspended as a result of the emergency action) of Petitioner Charles R. Hard's Airline Transport Pilot Rating effective February 26, 1957.

14. This "suspension" was because the Board determined that disciplinary action was called for and that it must impose a sanction by a substantial suspension of Petitioner Hard's rating to provide a sufficient deterrent against Hard and other pilots.

15. This Petition is for a review of that February 6, 1957 Order (No. S-779) of the Respondent, Civil Aeronautics Board, imposing a six month suspension sanction on the Petitioner.

16. The effective date of the Respondent's Order No. S-779 was postponed until March 11, 1957, all of which appears in the accompanying Motion to Stay which is annexed hereto and made a part hereof.

II.

The Facts Upon Which Venue is Based.

Petitioner Charles R. Hard is a resident of Western Springs, Illinois. Section 1006(a) of the Civil Aeronautics Act, as amended, 63 Stat. 107, 49 U.S.C., 646(a) provides for a judicial review of any order issued by the Authority under the Act. Section 1006(b) provides venue in the circuit wherein the Petitioner resides. Petitioner also invokes jurisdiction under Section 1009 of the Administrative Procedures Act, 5 U.S.C. 1009.

III.

The Grounds on Which Relief is Sought.

The relief is sought on the grounds that the Respondent, Civil Aeronautics Board, was without jurisdiction to hear, or power to impose a penalty action under the Civil Aeronautics Act and that it was an error to try a

case under Section 609 on the grounds that the airman lacked qualifications for an Airline Transport Pilot Rating and then to find that he was so qualified but to issue a deterrence sanction against him when the Act (Sections 901 and 902) specifically requires that such proceedings shall be processed in the appropriate district court with the provision for a trial by jury. (Section 903(b) (1).

IV.

The Relief Prayed.

Wherefore, Petitioner, Charles R. Hard, prays that the Court:

1. Reverse the Order (S-779) of the Civil Aeronautics Board with instructions to dismiss the Complaint.

2. Permanently enjoin the Board from misapplying the remedial procedure of the Act in order to invoke a penalty, deterrence or sanction.

3. Such other just and appropriate relief as the Court deems proper.

Respectfully submitted,
/s/ F. Harold Bennett
F. Harold Bennett
/s/ George F. Archer,
George F. Archer,
Attorneys for Petitioner
Charles R. Hard

Address for service:
c/o Air Line Pilots Assn.
55th St. & Cicero Ave.
Chicago 38, Illinois
Dated at Chicago, Illinois
this 6th day of March, 1957.

TIME AND MANNER OF THE PROCEEDINGS BELOW SO FAR AS APPLICABLE TO THE MATTER UNDER APPEAL
DOCKET NO. SR-2210

C. J. LOWEN, JR.,
Administrator of Civil Aeronautics,
Complainant

—vs—

CHARLES R. HARD,
Respondent

Appearances:

For Complainant:
Robert P. Boyle, Esq.
Gerald F. White, Esq.
Ned K. Zartman, Esq.

For Respondent:
F. Harold Bennett, Esq.

1956

March	8	Administrator of Aeronautics by his agent suspended for thirty days the Airline Transport Rating of respondent Chas. R. Hard.
March	16	Administrator's Complaint filed and served.
March	22	C.A.B. Bureau of Safety Investigation held
	23	public hearings on the Owensboro, Ky. incident of Feb. 7, 1956.
April	3	Emergency suspension of Hard's Airline Transport Rating renewed for an additional 30 days.
April	4	Respondent's Answer filed and served.
April	4	Respondent's Motion to Dismiss and Memorandum and affidavit in Support thereof filed and served.

April	4	Respondent's letter to C.A.B. Hearing Examiner Moorhead requesting that Motion to Dismiss, if denied by Examiner. be certified to the Board for disposition.
April	6	Complainant's letter to Hearing Examiner opposing Respondent's Motion to Dismiss.
April	6	Examiner's Order denying Motion to Dismiss.
April	26, 27, 28	Hearing on the merits held Before Examiner Moorhead of the Civil Aeronautics Board in Chicago, Illinois.
April	28	Examiner rendered Opinion, Findings and Order (oral) at close of hearing.
May	2	Examiner's Order of Clarification.
May	3	Notice of Appeal to the Board filed and served by Complainant.
May	7	Notice of Appeal to the Board filed and served by Respondent.
May	7	Respondent's request for extension of time to June 25, 1956 to file Specification of Errors.
May	9	Complainant filed and served opposition to extension of time.
May	16	General Counsel for Civil Aeronautics Board letter granting extension through June 1 for filing Specification of Errors and Exception to Initial Decision.
May	31	Respondent's Specification of Errors and Exception to Initial Decision of the Hearing Examiner and Brief in support thereof filed and served.
June	1	Complainant's Specification of Errors and Argument in Support of Appeal filed and served.
June	15	Respondent's Reply Brief filed and served.

July 5 C.A.B. adopted Accident Investigation Report of the Owensboro, Ky., accident of Feb. 7, 1956.

July 10 C.A.B. released above Accident Investigation Report.

1957

February 6 Order of Civil Aeronautics Board (S-779) issued ordering 6 months suspension of the Respondent's Airline Transport Pilot Rating effective February 26, 1957.

February 19 Respondent's Motion to stay effective date of order pending appeal filed and served.

February 21 Complainant's Reply to Respondent's Motion to Stay not objecting to staying the effective date of the Stay Order providing said Stay does not extend beyond the date to which a Petition for Reconsideration is due.

February 21 The Board's Order staying the effective date of its Order S-779 until March 11 provided that Respondent file a Motion for Reconsideration.

March 6 Respondent (Petitioner herein) filed Petition For Review by U. S. Court of Appeals, Seventh Circuit.

March 6 Respondent (Petitioner herein) filed Motion for stay of effective date of Board's order.

March 11 Order granting motion for stay pending determination for review by this Court signed by Hon. F. Ryan Duffy, Chief Judge.

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BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

C. J. LOWEN, JR., Administrator of Civil Aeronautics,
Complainant,
v.
CHARLES R. HARD,
Respondent.
} Docket No. SR-2210

COMPLAINT
(Received Mar. 16, 1956)

C. J. Lowen, Jr., Administrator of Civil Aeronautics, by his attorneys, alleges:

1. The jurisdiction of this Board is invoked under 609 of the Civil Aeronautics Act of 1938, as amended, [52 Stat. 1011, 49 U.S.C. 559].

2. The respondent is and has been at all times material herein the holder of Airman Certificate No. 45366-40 with an Airline Transport Rating.

3. That, on February 17, 1956, the respondent was employed and designated by Eastern Air Lines, Inc., as pilot-in-command of a Martin 404 aircraft, Identification No. N-445A, said aircraft then being engaged in scheduled air transportation as Eastern Air Lines' Flight 156.

4. That EAL Flight 156 departed from Evansville, Indiana, at approximately 1441 EST, en route to Owensboro, Kentucky, on an approved IFR flight plan to cruise at 2,000 feet.

5. That EAL Flight 156 arrived over the radio facility identified as Commercial Broadcast Station WVJS located approximately 1.9 miles north of Owensboro-Daviess County Airport and proceeded in the direction of the Owensboro-Daviess County Airport.

6. That EAL Flight 156 arrived at or over the Owensboro-Daviess County Airport, after which tt proceeded in a southwesterly direction and descended to an altitude of approximately 100 feet above the terrain while on the downwind leg for the runway of intended landing.

7. That after flying on the downwind leg in a southwesterly direction and at an altitude of about 100 feet above the terrain for a distance unknown to the complainant, the respondent maneuvered said aircraft into a steep left turn in an effort to turn the aircraft in the direction of the airport and the runway of intended landing.

8. That respondent failed to properly align the aircraft in flight for a normal landing on said runway; that said aircraft struck the ground short and to the right of Runway 5, causing extensive damage to the aircraft.

9. That respondent during the approach to the runway of intended landing operated said aircraft contrary to safe operating practices for a Martin 404 and in such a manner as to cause it to crash.

10. That the respondent operated said aircraft in a careless and reckless manner.

11. That respondent's operation of said aircraft, as alleged in Paragraphs 6, 7, 8, 9, and 10 herein, endangered the lives of the passengers and crew aboard EAL Flight 156, as well as the property of Eastern Air Lines, Inc.

12. That the respondent demonstrated, by his operation of said aircraft on EAL Flight 156, a lack of the technical proficiency and skill required of the holder of an Airline Transport Rating.

13. That the respondent operated said aircraft on EAL Flight 156 in violation of the following Civil Air Regulations:

a. Section 60.12, in that he operated the aircraft in a careless and reckless manner which endangered the lives and property of others; and

b. Section 40.18(a), in that he operated the aircraft contrary to Paragraph 32 of Eastern Air Lines' Operations Specifications by descending below 857 feet MSL prior to reaching a position from which a normal approach could be made to the runway of intended landing.

14. That the respondent by his conduct, as pilot-in-command of EAL Flight 156, demonstrated that he lacks the care, judgment and responsibility required of the holder of an Airline Transport Rating, in that as heretofore alleged he:

a. performed unsafe maneuvers with said aircraft at an insufficient altitude;

b. attempted a final approach to the runway of intended landing when it was unsafe to do so, and thereby endangered the lives and property of others; and

c. failed to adhere to the highest standard of safety required by the Civil Aeronautics Act, and established by the Civil Air Regulations and the Operations Specifications of Eastern Air Lines.

15. That an authorized agent of the Administrator of Civil Aeronautics made an emergency suspension of respondent's Airline Transport Rating, effective March 9, 1956, for a period of 30 days.

16. That if the Board finds respondent committed the violations heretofore alleged, but fails to find that an order revoking respondent's Airline Transport Rating should be issued, the public interest requires a suspension of respondent's Airman Certificate.

Wherefore, the Administrator of Civil Aeronautics requests that the Airline Transport Rating of respondent's Airman Certificate be revoked for lack of qualification or,

failing the entry of an order of revocation, that respondent's Airman Certificate be suspended.

Dated this 16th day of March, 1956.

Respectfully submitted,

/s/ R. P. Doyle
Robert P. Boyle
Civil Aeronautics Administration

/s/ Gerald F. White
Gerald F. White
Chief, Enforcement & Litigation Division
Civil Aeronautics Administration

/s/ Ned K. Zartman
Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration

12 (Letterhead of AIR LINE PILOTS ASSOCIATION)
(Received Apr. 5, 1956)

April 4, 1956

Mr. H. G. Moorhead
Hearing Examiner
Civil Aeronautics Board
Washington 25, D. C.

RE: Lowen vs. Hard,
Docket SR-2210.

Dear Mr. Moorhead:

Upon my return to the Home Office your letter of March 29, 1956 concerning our request for an extension of time to answer the Administrator's Complaint was on my desk for attention.

Our understanding with Mr. Zartman, Counsel for the Administrator, was that an extension of time to include Monday, April 9, would be agreeable, however, we have been able to gather the material necessary to our pleadings

and have filed the same as of this date, a copy is attached for your information. Our pleadings were due on Thursday, March 29, and it is therefore necessary to have the record reflect an extension of time until Wednesday, April 4. We ask that such an order be entered.

With respect to the expeditious disposition of the case, certainly we should be, and we are, most anxious for an early determination. It is our feeling however that we have been most grievously dealt with by the Administrator, and while we desire to cooperate within a realm of reason, we have no intention of being rushed into a hearing until we have had ample time to prepare. Additionally, we have every confidence that our Motion to Dismiss is proper, should be granted, and if you are in disagreement we desire that the question be certified to the Board for disposition before we are forced into a trial under the present Complaint.

Sincerely yours,
Air Line Pilots Association
/s/ F. Harold Bennett
F. Harold Bennett
Legal and Conciliation Dept.

FHB:jp
cc: C. N. Sayen, Pres., ALPA
N. Zartman, CAA, Trial Attorney

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BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—Docket No. SR-2210) • •

RESPONDENT'S MOTION TO DISMISS

(Received Apr. 6, 1956)

Comes Now the Respondent, Charles R. Hard, and states that the Complainant is not entitled to the relief prayed and moves the Board to dismiss the Complaint herein upon the following grounds:

1) Prior to the filing of the Complaint herein, which seeks revocation of Respondent's Airline Transport Rating, or in the alternative that Respondent's Airman Certificate be suspended, because Respondent "lacks qualification", Respondent was tested and fully examined by the Administrator and successfully demonstrated that he does not lack qualification to retain both his Airline Transport Rating and his Airman Certificate.

2) The Administrator has misconceived his action in seeking revocation of Respondent's Airline Transport Rating or in the alternative suspension of Respondent's
15 Airman Certificate upon the sole ground as alleged in the Complaint, i.e., that he lacks qualifications, in that, the Administrator is seeking to invoke such revocation as a penalty, and not for remedial purposes because at the time of the filing of the Complaint herein, the Respondent was known by the Administrator to be qualified.

Respectfully submitted,
/s/ F. Harold Bennett
F. Harold Bennett,
Attorney for Respondent

Dated at Chicago, Illinois, this 4th day of April, 1956.

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BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—Docket No. SR-2210) • •

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
(Received Apr. 6, 1956)

I.

Prior to the filing of the Complaint herein, which seeks revocation of Respondent's Airline Transport Rating, or in the alternative that Respondent's Airman Cer-

tificate be suspended, because Respondent "lacks qualification", Respondent was tested and fully examined by the Administrator and successfully demonstrated that he does not lack qualification to retain both his Airline Transport Rating and his Airman Certificate.

The incident in which the Respondent was involved, and which brought about the summary suspension of his Airline Transport Rating by the Administrator on March 9, 1956, occurred at Owensboro-Daviess County Airport on February 17, 1956. Following the incident in question and on March 4, 1956, Respondent was given the usual and customary six months Instrument Proficiency Check Ride and examination by Burt Poe, Eastern Air Lines Check Pilot and a Civil Aeronautics Administration designee for such purposes, and William Feast, Civil Aeronautics Administration Safety Agent, Air Carrier Operations,
17 Atlanta, Georgia, in which said six months Instrument Proficiency Check Ride and examination the Respondent, Charles H. Hard, successfully demonstrated his capabilities to retain his Airline Transport Rating and Airman Certificate, all as more fully set forth in the Affidavit of the Respondent Charles R. Hard, and the report of William Feast, Civil Aeronautics Administration Safety Agent, hereto attached and made a part hereof. Thus the Respondent, prior to the filing of the Complaint herein, was reexamined by the Administrator, and demonstrated to the full satisfaction of said Administrator that he (the Respondent) is fully qualified to retain his Airline Transport Rating and his Airman Certificate. Moreover, the Respondent, with the knowledge of the Administrator and without objection from him, was returned by Eastern Air Lines to flying the line as captain-in-command in scheduled airline transportation and on March 8, 1956 Respondent flew in such capacity; additionally, the Re-

spondent, with the knowledge and consent of the Administrator, has been flying the line in the employ of Eastern Air Lines as Copilot in scheduled airline transportation and has been so engaged since March 9, 1956, and is presently so engaged.

The Administrator has on the one hand, filed his Complaint before this Board seeking revocation of Respondent's Airline Transport Rating or in the alternative suspension of Respondent's Airman Certificate upon the sole ground that the Respondent "lacks qualification"; on the other hand, and prior to the filing of said Complaint, the Administrator by and through his Agent, William Feast,

Civil Aeronautics Administration Safety Agent, Air
18 Carrier Operations, Atlanta, Georgia, tested and examined Respondent, failed to find that he lacked any required qualification, and has in fact pronounced Respondent efficient and proficient in every usual and required regard, all as illustrated by Respondent's Affidavit and the report of the said William Feast, Civil Aeronautics Administration Safety Agent for that purpose, hereto attached.

The prayer for relief in the Administrator's Complaint reads as follows:

> "Wherefore, the Administrator of Civil Aeronautics requests that the Airline Transport Rating of respondent's Airman Certificate be revoked for lack of qualification, or, failing the entry of an order of revocation, that respondent's Airman Certificate be suspended."

The sole thrust of the Administrator's Complaint is directed at "remedial relief", due solely to the Respondent's alleged incapacities to perform his work efficiently; yet, the Administrator as required by Section 609 of the Civil Aeronautics Act, had, previous to the filing of the Complaint herein, reexamined the Respondent and by written report of said reexamination pronounced Respondent

proficient in very required regard. In the light of the Administrator's reexamination of the Respondent prior to the filing of the Complaint therein, and his finding that the Respondent possesses all of the required abilities and qualifications necessary to retain his Airline Transport Rating and Airman Certificate, the paramount and basic issue raised by the Complaint, namely: Whether or not Respondent "lacks qualifications", becomes moot.

19 Since the Respondent has been tested and examined by the Administrator subsequent to the happening of the incident complained of, and prior to the filing of the Complaint herein; and since the Respondent has successfully demonstrated to the satisfaction of the Administrator his (Respondent's) qualifications to retain his Airline Transport Rating and his Airman Certificate; and since the Respondent is presently flying as Copilot in scheduled airline transportation, with the knowledge and consent of the Administrator, it is submitted that the Administrator cannot now be heard to contend that the Respondent's Airline Transport Rating should be revoked upon the ground that the Respondent "lacks qualification", or that the Respondent's Airman Certificate should be suspended upon such grounds.

II.

The Administrator has misconceived his action in seeking revocation of Respondent's Airline Transport Rating or in the alternative suspension of Respondent's Airman Certificate upon the sole ground as alleged in the Complaint, i.e., that he lacks qualification, in that, the Administrator is seeking to invoke such revocation as a penalty, and not for remedial purposes because at the time of the filing of the Complaint herein the Respondent was known by the Administrator to be qualified.

Examination of the Affidavit of the Respondent attached to his Motion to Dismiss discloses that he is 44

years of age, and has been engaged in the occupation of a commercial airline pilot with Eastern Air Lines continuously since December 1942; first as a copilot between December 1942 and August 1946 and then as captain-in-command until the summary suspension of his Airline Transport Rating by the Administrator on March 9, 1956. That in all this time the Respondent was never involved in an incident or accident nor in any violation of the Civil Air Regulations. Moreoever, subsequent to the incident which occurred on February 17, 1956, and prior to the filing of the Complaint herein, the Respondent was examined by the Administrator and pronounced by written report of the Administrator's Agent William Feast, Civil Aeronautics Administration Safety Agent, Air Carrier Operations, Atlanta, Georgia, as possessing all of the required abilities and qualifications to retain his Airline Transport Rating and his pilot's certificate. In the face of this overwhelming evidence that Respondent does not "lack qualification" to retain both his Airline Transport Rating and his pilot's certificate, all of which was at the time well known to the Administrator, he (the Administrator) nevertheless on March 9, 1956, summarily suspended Respondent's Airline Transport Rating upon the "theory" that the Respondent "lacked qualification". As required by Section 609 of the Civil Aeronautics Act, under which section the Administrator presumes to act, he then filed his Complaint herein seeking the Board's sanction of his actions. The difficulties encountered in the application of the Administrator's theories lie in his approach to the problem of enforcement of the Civil Air Regulations. He seeks to foster upon this Board the use of its "remedial" powers of revocation as a "penalty". The Statutes were not so designed and they will not "work" to accomplish such a misapplication.

It is folly for the Administrator to charge a licensee with "lacking qualification" to exercise the privilege of his Airline Transport Rating or pilot's certificate because of a single inadvertent violation of the Civil Air Regula-
21 tions. Particularly is this true when, as here, the Administrator is in possession of facts which demonstrate that the Respondent has exercised the privileges of his license for a considerable period of years without incident or accident; and the Administrator has tested and reexamined the licensee and found him qualified in every required regard.

The Board's acceptance of the theories advanced by the Administrator in these proceedings will have the following amazing results:

1. A pilot's single infraction of a single air regulation no matter how inadvertent, subjects him to the revocation of his license, upon the Administrator's charge that by such infraction the pilot "lacks qualification".

2. Proof of the infraction is tantamount to proof of the "lack of qualification". The pilot whose license is thus revoked cannot apply for a re-issuance for a period of one year (CAB Section 21.21(b)).

3. Upon the pilot's application for re-issue of his license, the Administrator would be justified, if not required, to point to the judicial determination of the pilot's "lack of qualification" and refuse to re-issue the license; possibly forever.

4. There is no "yardstick" by which the Administrator can measure or determine the pilot's capacity for "qualification" (in the instant case the Administrator seeks revocation of Respondent's Airline
22 Transport Rating or in the alternative suspension of his pilot's certificate, notwithstanding that prior to the filing of the Complaint, the Administrator had exam-

ined the Respondent and pronounced him qualified in every required regard); therefore, there is no evidence which the pilot can produce to justify the re-issue of his license. There is no examination or test, the successful completion of which will demonstrate the pilot's requalification.

5. The Administrator will thus hold an arbitrary power of "life or death" over all pilot-licensees. He alone, by the use of some psychic processes will know and determine when the licensee has regained the "qualifications" necessary to the re-issue of his pilot license.

Can it be that the Administrator, in seeking revocation of the pilot's Airline Transport Rating, as in the instant case, has in mind that such license will never be restored? If that be the case, the Board's acceptance of the Administrator's theories and his approach to the problem of enforcement of the Civil Air Regulations, will create a most vexing problem indeed for all pilot-licensees, the Board and all other interested parties. We do not feel however, that the Administrator has any such thought in mind. Even if the pilot's license is "revoked" upon the charge by the Administrator that the licensee in this violation of the Civil Air Regulation has demonstrated he "lacks qualification", we envision a restoration of such
23 license by the Administrator after a period of time considered by him to be appropriate. If this be the case, has not the pilot's license only been "suspended"? Why then does the Administrator seek revocation which could finalize the license when in truth and in fact, he only intends a suspension. The answer is that the Administrator has misconceived his action and seeks to foster upon the Board its use of a "remedial power" in substitution for its power to "penalize". We urge upon the Board that "revocation" of a license upon the Administrator's charge

that the licensee in violating a single Civil Air Regulation, demonstrates him to "lack qualification" can spell finé to the licensee's career upon a single infraction of a Civil Air Regulation, no matter how inadvertent. To accept this theory and approach to the enforcement problem will not only do havoc to pilot-licensees, it will create additional problems to all interested parties, the end of which is not presently in sight.

CONCLUSION

For the reasons advanced herein, the Administrator is not entitled to the relief prayed in his Complaint and it is requested that the Complaint be dismissed.

/s/ F. Harold Bennett
F. Harold Bennett, Attorney for
Charles R. Hard, Respondent

April 4, 1956

24 AFFIDAVIT

State of Illinois } ss.
County of Cook }

I, Charles R. Hard, being first duly sworn on oath depose and say:

1. That I am 44 years of age and reside at 4942 Fair Elms Avenue, Western Springs, Illinois.

2. That I qualified as a private pilot at the Palmetto Air School, Spartanberg, South Carolina during the month of August 1940; and thereafter qualified for a commercial pilot's license at Palm Beach Aero School at Lantana Airport, Florida in July 1942.

3. That I received my instrument rating in December 1942 at a school conducted by Eastern Air Lines at Atlanta, Georgia and entered the employ of Eastern Air Lines as a copilot on that date; that I flew continuously

thereafter as a copilot in the employ of Eastern Air Lines until my promotion to captain as hereafter related.

4. That I received the required training for my Airline Transport Rating with Eastern Air Lines and acquired such Rating in August 1946; that I flew my first trip as captain-in-command on Eastern Air Lines in November 1946; that I have been continuously employed in such capacity since that date and until the summary suspension of my Airline Transport Rating by the Civil Aeronautics Administrator on March 9, 1956.

5. That to the date of the incident at the Owensboro-Daviess Airport, Owensboro, Kentucky on February 17, 1956 I have accomplished 10,491 hours of flight time as a commercial airline pilot, including approximately 1,443 instrument hours; that 3,532 such flight time hours were accomplished in the Martin 404 equipment.

6. That in the 16 years of my career as a commercial airline pilot, and until the incident at the Owensboro-Daviess Airport, Owensboro, Kentucky on February 17, 1956, I was never involved in an airline accident or incident; and have never been involved in any violation of the Civil Air Regulations.

7. That as a commercial airline pilot of Eastern Air Lines I have operated aircraft in and out of Owensboro-Daviess Airport, Owensboro, Kentucky, in excess of 100 times including numerous instrument approaches.

8. That following the incident at the Owensboro-Daviess Airport, Owensboro, Kentucky on February 17, 1956 I was directed by Eastern Air Lines to report to the Atlanta, Georgia base of that Company and on March 3, 1956 I was required to fly the Martin 404 equipment some 2½ hours under the observation of Burt Poe, Eastern Air Lines Check Pilot, and a designee of the Civil Aeronautics Administration to give commercial airline pilots Six Month Instrument Check Rides and Examinations for proficiency.

9. That on March 4, 1956 I was given the usual Six Month Proficiency Instrument Check Ride and Examination by Burt Poe and William Feast, Civil Aeronautics Administration Safety Agent, Air Carrier Operations, Atlanta, Georgia, which I completed to the satisfaction of Check Pilot Burt Poe, and CAA Safety Agent William Feast, all as indicated by a copy of said Proficiency Instrument Check Ride and Examination report of William Feast hereto attached and made a part hereof.

10. That having thus successfully completed the Six Month Proficiency Instrument Check Ride and Examinationto the satisfaction of the Company Check Pilot Burt Poe and the Civil Aeronautics Administration Safety Agent William Feast, I was returned to schedule flying by Eastern Air Lines on March 6, 1956, and on March 8, 1956 I flew as captain-in-command on a Martin 404 in scheduled operation from Chicago, Illinois to Charlotte, North Carolina.

11. That on the evening of March 8, 1956 upon my arrival in Charlotte, I was informed of the summary revocation of my Airline Transport Rating by the Civil Aeronautics Administrator; since that date I have been flying in scheduled airline operation with Eastern Air Lines as a copilot only.

Further, Affiant saith not.

/s/ Charles R. Hard
Charles R. Hard

Subscribed and sworn to before me
this 30th day of March, 1956.
(Seal) Janet Putz, Notary Public
My commission expires Nov. 9, 1957

27 U. S. Department of Commerce
Civil Aeronautics Administration

APPLICATION FOR PILOT CERTIFICATE OR RATING

(Attached and Made Part of Affidavit)

SPECIAL flight test report: 6-MO.CK.

1. Name (first, middle, last): C. R. Hard.
2. Permanent Mailing Address: • • • EAL ATL.

• • •

11. Aircraft to be used (make and model): M-404.

• • •

12. I certify that the statements made by me on this application are true.

28 14. • • •

15. Examiner's Recommendation and Action.

• • •

Given by W. B. Poe.

• • •

16. Agent's action: Approved.

Wm. E. Feast
Signature of Agent

Date: 3/4/56.

29 GRADING LEGEND

1.	Well above average	(90-100)
2.	Above average	(85-89)
3.	Average	(80-84)
4.	Below average	(70-79)
5.	Unsatisfactory	(0-69)

FLIGHT MANEUVERS

	Airline Transport Agent
1. Flight instruction (oral)	
2. Equipment examination (oral)	3
3. Pre-flight check	3
4. Taxiing, or sailing and docking	2
5. Run-up	3
6. Take-offs: Hooded	2
• • •	
10. Climbs and climbing turns	3
11. 720° steep turns	
12. Maneuvering at minimum speed (slow flight)	3
13. Stalls	3
• • •	
22. Landing technique	3
• • •	
26. Traffic control procredures	3
27. Steep turn (Instruments only)	3
• • •	
30. Use of radio equipment	2
31. Orientation	2
• • •	
34. Instrument approach procedures	3
• • •	
36. Use of directional radio	3
37. Radio descent and pull up	3
38. Engine(s) out procedure	3
39. Maneuvering with engine(s) out	2
40. Maneuvering for landing at weather minimums	3
Instrument Agent:	500-1
41. Take-off and landing with engine(s) failure	2
42. Emergencies	3
43.	
44. Smoothness and co-ordination	3
45. Judgment	3

ADDITIONAL MANEUVERS OR REMARKS:

ILS 3

Actual use of oxygen mask 3

Final grade (not an average): 80%

Registration number of aircraft used for flight test: N 452A Martin 404.

30 (Received Docket Section Apr 6 930 AM '56—
Civil Aeronautics Board)

31 BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

* * (Caption—No. SR-2210) * * *

ANSWER

Comes Now the Respondent, Charles R. Hard, and without prejudice to, or waiver of his Motion to Dismiss the Complainant's Complaint which is filed simultaneously with this Answer, alleges Answer to the Complaint herein as follows:

1. Respondent admits the allegations of Paragraph 1, 2 and 3 of said Complaint.

2. Respondent admits the allegations contained in Paragraph 4 of said Complaint except the allegation that Eastern Air Lines Flight 156 departed from Evansville, Indiana at approximately 1441 EST, and as to this allegation Respondent demands strict proof.

3. Respondent admits the allegations contained in Paragraph 5 of said Complaint, except the allegation therein that EAL Flight 156 on arrival over the radio facility identified as Commercial Broadcast Station WVJS proceeded in the direction of Owensboro-Daviess County Airport, and as to this allegation Respondent demands
32 strict proof.

4. Respondent admits the allegations of Paragraph 6 of said Complaint except the allegation therein that EAL Flight 156 descended to an altitude of 100 feet above the terrain while on the downwind leg for the runway of intended landing, and as to this allegation Respondent demands strict proof.

5. Respondent denies the allegations of Paragraph 7 of said Complaint and demands strict proof thereof.

6. Respondent admits the allegations of Paragraph 8 of said Complaint; and Respondent states the facts to be that his failure to properly align the aircraft in flight for a normal landing on said runway, the aircraft's striking the ground short and to the right of Runway 5, and the resulting extensive damage to the aircraft, all resulted from factors outside the control of the Respondent and not reasonably foreseeable although at the time the Respondent was exercising the highest degree of care, caution and judgment for the safety of said flight.

7. Respondent denies the allegations of Paragraphs 9, 10, 11, 12, 13 and 14 of the Complaint and demands strict proof thereof.

8. Respondent admits the allegations of Paragraph 15 of said Complaint.

9. Respondent denies the allegations of Paragraph 16 of said Complaint and demands strict proof thereof.

Respondent denies that Complainant is entitled to the relief prayed in his Complaint or any relief whatsoever, and asks that the Complaint be dismissed.

Respectfully submitted,

/s/ F. Harold Bennett

F. Harold Bennett, Attorney for Charles R. Hard, Respondent

Dated at Chicago, Illinois
this day of April, 1956.

CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the Respondent's Answer to Complainant's Complaint has been served upon the following parties, by mailing copies thereof, postage prepaid, in a properly addressed envelope:

Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration
Washington, D. C.
H. G. Moorhead
Hearing Examiner
Civil Aeronautics Administration
Washington, D. C.

/s/ F. Harold Bennett
F. Harold Bennett

Dated at Chicago, Illinois
this 4th day of April, 1956.

34 Department of Commerce
CIVIL AERONAUTICS ADMINISTRATION
Washington 25

(Received Docket Section Ap 6 301 PM '56—
Civil Aeronautics Board)

Apr 6 1956

Mr. H. G. Moorhead
Hearing Examiner
Civil Aeronautics Board
Washington 25, D. C.

Dear Mr. Moorhead: Re: Lowen v. Hard
Docket No. SR-2210

We have received a copy of the respondent's Motion to Dismiss with attached memorandum and affidavit, which upon examination shows no grounds upon which the Examiner could dismiss the complaint consistent with the Board's past practices in air safety proceedings. It appears that whatever defensive material might be contained therein could be presented at a hearing on the merits. In order to avoid delay, we do not intend to file a formal reply to the Motion, unless the Examiner indicates such a reply is necessary for a disposal of the Motion.

In a confirmation of an inquiry by your office, Mr. Ora W. Young, Regional Administrator, Region One, Civil Aeronautics Administration, on April 3, 1956, by letter, a copy of which is attached, extended the emergency suspension of Captain Hard's Airline Transport Rating for an additional 30 days—that is until May 7, 1956.

Very truly yours,
/s/ Robert P. Boyle
Robert P. Boyle
General Counsel

Enclosure
cc: F. H. Bennett, ALPA
Captain Charles R. Hard

35 (Received Docket Section Apr 6 301 PM '56—
Civil Aeronautics Board)

CERTIFIED AIR MAIL—Return Receipt Requested

April 3, 1956

Mr. Charles R. Hard
West Springs
Illinois

Dear Mr. Hard:

You are hereby advised that the emergency suspension of your Airline Transport Rating, which became effective March 9, 1956 for a period of thirty days, is hereby extended for an additional period of thirty days—until May 7, 1956.

Sincerely yours,
Ora W. Young
Administrator

cc: W-60, G. White
NY-220—Mr. Woodward (4 copies)
Agent Rinebold

36

April 6, 1956

Mr. F. Harold Bennett
Air Line Pilots Association
55th Street and Cicero Avenue
Chicago 38, Illinois

Dear Mr. Bennett:

re: C. J. Lowen, Jr., vs.
Charles R. Hard,
Docket No. SR-2210

I have received your letter of April 4th regarding the above-identified proceeding. You request the extension of time which was implied in my letter of March 29th. You also agree that you are most anxious for an early determination but do not desire to be rushed into a hearing. You also present a motion to dismiss and request that it be certified to the Board before you are "forced into a trial under the present complaint."

This letter and my letter of March 29th extend your time for answer so that your submissions of April 4, 1956 are accepted as timely.

You have not developed the facts of your position regarding the hearing, so that I do not know what you regard as an acceptably early disposition as contrasted with a setting which you would regard as "rushing" you. The Act in Section 609 appears to contemplate dispositions as possible within 30 days after emergency suspension with no provision for a longer period than 60 days. This and the high rating of Airline Transport Pilot impel me to as prompt action as will be fair. Please inform me if a hearing in the week of April 23rd would prejudice you in any way as too soon.

Regarding your motion to dismiss, I enclose my ruling which denies it. However, you will not that you are not foreclosed from raising the grounds again for a defense

upon the merits if you continue your opinion concerning their ultimate validity.

If you prefer that the hearing be set at a place other than Chicago, please inform me to that effect. Otherwise, I will assume that a hearing at Chicago, Illinois, will be most convenient for both parties upon balancing of all factors involved.

Very truly yours,
/s/ H. G. Moorhead
H. G. Moorhead
Hearing Examiner

37 CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—No. SR-2210) • •

ORDER DENYING MOTION

To Respondent Charles R. Hard,
F. Harold Bennett, Air Line Pilots Association,
55th Street and Cicero Avenue, Chicago 38, Illinois

Complainant C. J. Lowen, Jr., Administrator of Civil Aeronautics,

Robert P. Boyle, General Counsel,
Gerald F. White, Chief, Enforcement and Litigation,
Ned K. Zartman, Trial Attorney, Washington, D. C.

Respondent having by motion dated April 4, 1956, requested that the complaint herein be dismissed on the ground, first, that Respondent contrary to the complaint has demonstrated that he does not lack qualification to retain both his Airline Transport Rating and his Airman Certificate, and on the ground, second, that Respondent is being subjected to alternative request for revocation or suspension for lack of qualification while known to be qualified and thus, Respondent states, as a penalty rather than for remedial purposes; and

It appearing that the first ground of Respondent's motion is not a basis for a motion to dismiss but is rather appropriate for defense upon the merits, and that the second ground is inconsistent with the Board's safety enforcement proceeding practice since the earliest reported case as an objection to procedure and is an issue for trial upon the merits in substance; and

It appearing further that the questions of the motion should not be certified to the Board as Respondent has requested by letter, contingently, since intermediate certifications are not favored in safety enforcement practice nor specifically in this case consistent with the public's statutory interest in prompt disposition of proceedings which involve, as does the present, an emergency suspension of an airman certificate;

A ruling should issue whereby,

Respondent's motion to dismiss the complaint herein is denied.

/s/ H. G. Moorhead
H. G. Moorhead,
Hearing Examiner

Dated this 6th day
of April, 1956 at
Washington, D. C.

40 (Letterhead of Air Line Pilots Association)

(Received Docket Section Apr 23 1055 AM '56—
Civil Aeronautics Board)

April 19, 1956

Mr. N. Zartman,
Trial Attorney
Civil Aeronautics Administration
Washington 25, D. C.

Re: C. J. Lowen, Jr., Administrator
vs. C. R. Hard — CAB Docket
SR-2210

Dear Mr. Zartman:

By this letter we are confirming our understanding had with respect to the trial of the above case, which is to begin in Chicago on Thursday, April 26, 1956.

My understanding of the agreement is that the writer, as Attorney for Mr. Hard, will be able, without objection from you as Attorney for C. J. Lowen, Jr., Administrator, to introduce at the hearing the transcript of the testimony of any of the ground witnesses who testified at the Accident Investigation Hearing on March 22 and 23, 1956 in Owensboro. The same privilege is not extended to you as Attorney for the Administrator, that is to say, we have no agreement which will permit the Administrator to introduce any part of the transcript taken at the Accident Investigation Hearing above-mentioned, and if the Administrator desires to introduce any part of this transcript it may be over my objection.

If my understanding expressed above is in anywise incorrect I will expect a clarification without delay.

Yours very truly,
Air Line Pilots Association
F. Harold Bennett
Legal and Conciliation Department

FHB:jp
cc: C. N. Sayen, President, ALPA
H. G. Moorhead, CAA, Hearing Examiner

OPINION OF HEARING EXAMINER MOORHEAD DELIVERED ORALLY AT CLOSE OF HEARING ON APRIL 28, 1956

530 Examiner Moorhead: There are a number of conflicts in the testimony. I believe that a lot of them are not, individually, too material; such as the exact point where Respondent broke through after coming in from the broadcasting station WVJS. There was the thought that he came close to the north. He testified he turned about a mile north. There were two pilots, as I recall, who would not commit themselves to the statement that

they could make their right turn at the field or within a distance north of it but close to it. However the Chief Pilot, I believe, did say it could be safely conducted even if it were started at the field.

I believe, on the whole, that type of approach, as a type of approach, was not contrary to safety or the regulations, distinguishing the type from the execution.

After a great deal of thought about exactly how the approach was made, on the conflicting testimony and putting all the facts together, I am unable to get past the statement, contrary to interest, which Respondent made to Agent Rinebold that he was approximately a half mile out.

I think that it must necessarily be very difficult for a person to recall, some long-time after a very serious accident like that, exactly what all the de'ails were; and I do not believe there has been any conscious falsification. But as I put this together, it seems on the whole it was more likely that Respondent was not out to within approxi-
531 mately 900 feet of a mile, where the turn could have been made without question under the regulations; and, in accordance with the testimony of the experts called by Respondent when they approved the procedure as a whole.

As a type of approach, I do not think that it was wrong; as a question of execution, something went wrong, obviously, during the course of it. Now, the question is whether there is sufficient evidence to prove that this was contrary to the regulations and poor judgment. On this, I believe that Respondent has to be judged as of the time and place and cannot be completely second-guessed and judged completely on a basis of what happened. There certainly is no absolute liability for an accident. I do not believe that the complainant has taken that position, although it has been dramatized, so to speak, in that way by the defense.

Respondent made a very steep left bank. It was steeper than he intended to make, and he does not know how it got as steep as it did. There is some possibility of some gusts, although the air at the airport was calm. I believe it has to be remembered that thunder and lightning that were observed were to the southwest of the airport, and at this time, on the base leg, Respondent was just as close to that area as he came throughout the whole flight. There was no evidence to show that he cut short of what otherwise would have been the distance he would have gone to the southwest before turning, because of danger
532 of a thunder storm there, but there is the possibility that a finger of gust reaching out could have affected the aircraft, although I reject the possibility of horizontal air currents, as such. It would be merely a gusty type of turbulence which did not exist generally.

On the other hand, the case is very close. The testimony was consistent that in these approaches a lot is left to a pilot's judgment. That, unquestionably, has to be good judgment. I think there should be no question but what a pilot should be immediately revoked if he were pulling a grandstand type of approach, or if he swung an airplane through a heavy bank to the left, then a heavy bank to the right, and sets down with the wheels touching as soon as it rolls to a level position. I am convinced that Respondent was not doing that. The accident was close to a matter of inches. There was, apparently, a depth of four inches. Apparently with four or five inches, it would have been safe; and possibly with even two inches it would have made the distance. In the same way, the timing gets down to seconds; possibly, within a second. Respondent thought the 'plane had righted itself. Perhaps in another second it might have all right, too. He would have hit evenly, and even if he had hit off the runway, there possibly would not have been an accident.

I do not want to get into speculation. I am merely showing that the accident was the result of very close conditions.

533 If Respondent, in making a bank, had been thrown into a heavy bank for a reason beyond his control—for which I can only think of a air condition as being adequate and unusual; if it was such, it was unusual—then, there is a break in the train of causation which makes the troubles of the flight follow from the failure to make a wide enough separation on the approach.

I believe that there is such a serious question about the situation that Mr. Rinebold, in imposing the emergency suspension, cannot be criticized. In spite of the fact that judgment was approved in a test, I believe that this type of judgment which we are talking about—this judgment which is necessary in the holder of a certificate—is something that must be demonstrated over a period of time. A man must be able to meet emergencies as an airline pilot, and just one test is not enough; although, as I understand it, the examination system is predicated merely on the presumption that a man, having had the training he has and the experience he has, will not in the absence of mistake be deemed to be other than qualified upon that point. He is judged upon his behavior during the test, but it is against a background.

There is a possibility that Respondent may have caused a stall or a partial stall or a cross-controlled slip of the airplane a tiny bit, pulling it out of the last bank, unintentionally. However, I do not believe there is adequate evidence to say that he did. The evidence as a whole

534 impresses me as establishing a set of facts where there is doubt and necessity for action to protect the public interest; but there is no occasion for any punitive type of action. The situation as a whole is a marginal one. I think it can be said the Respondent should have been a

little farther out, a little more lateral margin from the runway, but to say that he was far enough off to have violated the Civil Air Regulations strikes me as a different question. I believe there is some margin. There is an area within which it cannot be said that violation is established by subsequent actions, without proof of an inability generally to handle that type of a situation and persevering in the piloting in spite of inability, or an improper attitude in some way.

The standard, as the complainant has stated, is the highest. Upon that question, we have the regulatory problem of an industry in that, for instance, in the sea navigation industry masters and pilots there are only given one chance to make a mistake—at least in practice. If something goes wrong, they may not lose their operating certificate, but for practical purposes in that industry they are out. It is my understanding they do not get a second chance. However, in aviation, there has not been that condition. There the Board has had some cases when there was a clear deficiency on the part of pilots, and yet a comparatively short period of suspension was imposed.

Turning to that angle of this case, since February 17 535 did not fly until February 29, and then again until March 3 and 4. So that there was that period of approximately 16 days when he was completely out of the air. Then, subsequent to that time, he has been operating only as a co-pilot.

I believe that to the extent that a suspension has any punitive bearing, that that should be regarded as adequate in this case. It is my own view of the law that suspension is remedial, although the punitive effect of them is recognized when occasion arises for such recognition. For instance, in this one the testimony of witnesses is compelling. I believe that a suspension for a number of days, for a term, cannot be regarded as remedial, when its remedial

aspect is its primary function; and I believe that is the history of the Board's practice, without any deviation at all in what the Board has actually done, although what the Board said could be interpreted differently in the case of Lee vs. Brubaker and Olson. Therefore, I would not think that the punitive elements of a suspension for a period of time would necessarily be ruled out because the complaint is drafted upon a remedial basis.

However, I find no need for the punitive continuation and therefore merely make my ground of decision clear by stating my view of the law and the Board's practice. I believe I have made it clear that I do not think the re-examination given by Mr. Feast was adequate to control on the matter of judgment. That had to be supplemented by further experience. However, after reaching that 536 conclusion, I go on in accepting the testimony of Captain Clifford. I believe that Respondent has, since then, shown that he does have judgment requisite for an airline captain. After all, he has had a record, against which there is an accident like this, where there is of course serious ground for suspension, but not—I do not believe—the necessary degree of proof that we have to have in taking away the man's Airline Transport Rating.

With regard to a point which has not been argued in this case, but which was otherwise raised, I believe that the Board does have the complete responsibility rather than the Administrator when a case is brought for revocation. Granted, if someone applies for a certificate, the Administrator does have a discretion; but when a case is brought for revocation, the terms of Section 609 of the Regulations place the responsibility flatly upon the Board, rather than the Administrator, the determination of whether or not there shall be revocation.

To make the point specific, I am unable to draw any inference against Respondent because the co-pilot was not

called by him. I believe that the point is not necessarily more probative against one party than the other, although of course he does work with the Respondent. On the other hand, I think it is a reasonable attitude that if the Respondent's testimony were not going to be believed, then probably such corroboration as the co-pilot would give would not be believed. It is a question of whether
537 the physical facts would overcome the direct evidence. I have found, to a modified extent, that that is the fact in each case.

I believe that the general nature of the case is well illustrated by this situation with respect to the stall. In the argument, complainant was willing to concede that the evidence was not conclusive with regard to the stall and that the experts from the Martin Company thought that there definitely could not be said there was a stall. On the other hand, there was the matter of buffeting that was, necessarily, inconsistent with the possibility of the accelerated stall; and the record, as a whole, strikes me as being very much in that type of a posture where one simply cannot be sure exactly what did happen and there is not a clear enough, well-marked line to say that Respondent did something wrong getting into this situation. I mean, it is so much a question of degree, of difficult judgment in there. There is a case made out for the protection of the public interest, but that has been taken care of. There is no case made out for anything further.

FORMAL FINDINGS:

Upon the Record Herein, the Examiner finds:

I.

That the Civil Aeronautics Board has jurisdiction in this proceeding under Section 609 of the Civil Aeronautics Act of 1938, as amended.

538

II.

That the Respondent is, and at all times material herein, has been the holder of Airman Certificate No. 45366-40 with an Airline Transport Rating, but that the said rating has been under emergency suspension since March 19, 1956.

III.

That, on February 17, 1956, Respondent in the employment of Eastern Air Lines, Inc., as pilot in command of a Martin 404 aircraft, Identification No. N-445A, piloted the said aircraft in scheduled air transportation as Flight 156, from Evansville, Indiana, at a departure time—which is not controlling—which is estimate-able as 1441 Eastern Standard Time, with a destination of Owensboro, Kentucky, on an approved Instrument Flight Plan, cruising at 2,000 feet, and arrived over Commercial Broadcast Station WVJS approximately 1.9 miles north of Owensboro-Daviess County Airport and with proper instrument procedures turned and made an instrument let down for the said County Airport breaking out of the 600 foot ceiling with reported one-mile visibility at approximately 550 feet altitude over the terrain which would be 407 feet at the airport, hence was approximately 960 feet mean sea level.

IV.

That Respondent took over the controls for piloting the said aircraft, Flight 156, approximately one mile north of said airport, whereafter he executed a right turn to
539 roughly parallel Runway 5 for a landing on that runway, in an approach which was proper in type, but questionable in execution, in that Respondent did not fly to a sufficient lateral distance within 900 feet of a mile from the said airport, but to a distance which he subsequently estimated as one-half mile of lateral separation, which distance, while it may have exceeded this estima-

tion, nevertheless required more than a 30-degree bank to complete the turn for alignment with Runway 5, considering the air speed of 120 knots on the downwind leg, reduced to 110 knots thereafter, and the weight and condition of the said aircraft, such operation being regarded as marginal and a difficult decision, which is within the requirements and an airline captain's exercise of judgment under conditions rendering the decision difficult.

V.

That to the southwest of the said airport were thunder storms, showers with thunder and lightning, whereas on the said airport there was a condition of fog allowing one mile official visibility and a three-mile an hour wind from the northeast.

VI.

That, as the result of an excessive left bank, which may have been caused by over control or some variety of stall, but also may have been caused by an air condition which was not to have been anticipated but nevertheless may
540 have been existing in that locality, Respondent in recovery added power and thereafter had a right bank of the said aircraft, with the result that Respondent overshot the point from which the perfect approach should have been started to Runway 5, and in the right bank failed by inches of distance and a second or less of time in completing the recovery to a point where no accident would have resulted; but that, in fact, the said aircraft struck the ground short and to the right of the runway, causing extensive damage to the said aircraft.

VII.

That the Respondent during the approach to the runway of intended landing operated the said aircraft in accordance with the proper plan, but in a marginal execution which resulted in there being no allowance of a mar-

gin for error, which has required his re-examination in the public interest with regard to his technical proficiency and skill for the holding of an Airline Transport Rating.

VIII.

That the landing of the said aircraft endangered the lives of passengers and crew aboard the said Flight 156 and the property of Eastern Air Lines, Inc.; but that it has not been proved that Respondent's attitude was in any way careless or reckless.

Mr. White: Attitude?

Examiner Moorhead: Attitude, Mr. White.

541 Parenthetically and aside, the carelessness and recklessness are terms of attitude, although there are situations in which the Board has held the finding of such things irrespective of attitude.

IX.

That Respondent on the said flight did not operate the said aircraft contrary to the provisions of Section 40.18(a) of the Civil Air Regulations, with recognition that any turn on to final may normally result in a certain amount of loss of altitude which this finding concludes is not prohibited by that regulation.

Examiner Moorhead: I will just ask you if you think the maneuvers are adequately covered already. Do you think it is covered?

Mr. White: I would appreciate the order at this time, if the Examiner please.

Examiner Moorhead: I was wondering if you thought there should be another finding added to that Paragraph 14 of the Complaint. I think it is probably already covered.

X.

That the public interest has required the testing of Respondent's capabilities, which has expired in time at this point; namely, a test of his judgment over a period of time, but that upon the record there appears to be no necessity for further action by the Board of either a remedial
542 or punitive nature, if punitive is to be regarded as separate and distinct from remedial.

ORDER

It Is Ordered:

That, subject to provisions for appeal, which are hereinafter stated, this proceeding be, and it hereby is, dismissed; effective May 7, 1956.

Mr. White: Is it the Examiner's intention that the effect of his order be to terminate the emergency suspension?

Examiner Moorhead: From a strictly legal point of view, of course, the decision cannot speak prior to its effective date.

If you are asking me as to whether I think it would be consistent with the public interest to terminate it sooner, I believe I would say yes.

Mr. White: Do you want to so order?

Examiner Moorhead: I cannot make my order effective any sooner than the allowance of the period for appeal would permit.

Mr. White: Your order can be effective, subject to being overturned if appeal is taken and an order changing the effectiveness of your order is entered by the Board.

Examiner Moorhead: As I see it, compliance prior to the effective date of the order has to be on a voluntary basis. If it is the pleasure of the parties, I would be glad—

Mr. White: Just to clarify the point, the Adminis-
543 trator ought to not be in position of having the Examiner say, "I think you ought to do this or that." You have the authority, under Section 609, at the hearing to determine whether suspension is in order or not.

Examiner Moorhead: This is my view: that my order cannot, in the nature of things, be effective until the effective date arrives unless by mutual consent the parties appeals are waived.

With that explanation, I will redraft the order.

Mr. White: Perhaps, if the Examiner wants to withdraw the observation that he does not think the emergency suspension, in the interest of the public is to continue—

Mr. Bennett: It seems to me that the order should probably be that the proceedings are dismissed, with the right of appeal as required by law. Then, the date of the order, of course, would terminate the emergency suspension.

Mr. White: Off the record, sir?

Examiner Moorhead: Off the record.

(Discussion off the record.)

Examiner Moorhead: On the record.

The only way I can see is to simply leave out "effective May 7."

It is ordered that these proceedings be and hereby are dismissed.

544 • • •

668 CIVIL AERONAUTICS BOARD
Washington

• • (Caption—Docket No. SR-2210) • •

ORDER OF CLARIFICATION.

The Hearing Examiner being advised that Respondent has requested Complainant to release the emergency sus-

pension which Complainant imposed on Respondent's airline transport rating on March 9, 1956, and that Complainant for compliance therewith desires clarification of the Initial Decision which was issued orally herein on April 28, 1956, so that the said decision cannot be interpreted to require that the said rating remain suspended until May 7, 1956; and

It appearing that the ruling of Complainant's request is within the intention of the said decision, which was to find that the said emergency suspension satisfied the public interest however soon terminated, but with findings and an order appropriate to recognition of the limitations of the hearing examiner's power, which would not permit him to order its termination prior to the earliest date upon which the said decision could become final as that of the Board, May 7, 1956; and therefore, it appearing that the said request for clarification may, and for the convenience of the parties, should be granted;

It Is Ordered, That the Initial Decision which was orally issued herein on April 28, 1956, be, and it hereby is clarified by addition and amendment thus to in-
669 clude a supplementary finding which reads as follows:

> "That the emergency suspension of Respondent's airline transport rating which was imposed March 9, 1956, has been required in the public interest but is no longer required as of the time of its release, whether such release occur at any time on or after this 28th day of April 1956, by discretionary action of the Administrator, or whether such release occur in compliance with the requirement of the order herein which will become effective as hereinafter provided on May 7, 1956."

It Is Further Ordered, That if there be any provision or provisions of the Initial Decision herein which are inconsistent herewith, they be, and hereby are amended to conform hereto.

Dated this 2nd day
of May, 1956, at
Washington, D. C.

/s/ H. G. Moorhead
H. G. Moorhead
Hearing Examiner

670 BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D.C.

(Received Docket Section—May 3, 9:37 AM '56)

* *(Caption—Docket No. SR-2210) * *

NOTICE OF APPEAL.

Please Take Notice that the Complainant, C. J. Lowen, Jr., Administrator of Civil Aeronautics, by his attorneys, intends to appeal to the Civil Aeronautics Board, in accordance with Section 301.30 of the Board's Rules of Practice, the Initial Decision of the Examiner issued April 28, 1956 in the subject proceeding.

Dated: May 3, 1956.

/s/ Robert P. Boyle
Robert P. Boyle
General Counsel
Civil Aeronautics Administration

/s/ Ned K. Zartman
Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration

CERTIFICATE OF SERVICE.

I hereby certify that a copy of this Notice of Appeal has been served upon the following by mailing, postage prepaid, a copy thereof in a properly addressed envelope to:

Captain Charles R. Hard
Western Springs, Illinois
Mr. F. Harold Bennett
Legal Department
Air Line Pilots Association
55th Street & Cicero Avenue
Chicago 38, Illinois

Dated: May 3, 1956.

/s/ Ned K. Zartman
Ned K. Zartman
Civil Aeronautics Administration

671 BEFORE THE CIVIL AERONAUTICS BOARD
Washington, D. C.

(Received Docket Section—May 9, 3:39 PM '56)

• • (Caption—Docket No. SR-2210) • •

NOTICE OF APPEAL.

Please Take Notice that the Respondent, Charles R. Hard, by his attorney, intends to appeal to the Civil Aeronautics Board, in accordance with Section 301.30 of the Board's Rules of Practice, the Initial Decision of the Examiner issued April 28, 1956 in the subject proceeding.

Dated: May 7, 1956.

/s/ F. Harold Bennett,
F. Harold Bennett, Attorney for
Respondent Charles R. Hard

CERTIFICATE OF SERVICE.

I hereby certify that a copy of this Notice of Appeal has been served upon the following by mailing, postage prepaid, a copy thereof in a properly addressed envelope to:

Robert P. Boyle
General Counsel
Civil Aeronautics Administration
Ned K. Zartman
Trial Attorney
Civil Aeronautics Administration
Washington, D. C.

Dated: May 7, 1956.

/s/ F. Harold Bennett,
F. Harold Bennett, Attorney for
Respondent Charles R. Hard

734 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

• • (Caption—Docket No. SR-2210) • •

Decided: February 6, 1957

Appearances:

Gerald F. White, Chief Litigation and Enforcement Division, Civil Aeronautics Administration.

Ned K. Zartman, Trial Attorney, Civil Aeronautics Administration.

F. Harold Bennett, Attorney, Air Line Pilots Association.

OPINION.

By The Board:

This proceeding arises out of a landing accident which occurred at the Owensboro, Kentucky, Airport on February 17, 1956. The aircraft, an Eastern Air Lines Martin 404 with 20 passengers on board, ended up on its back with the right wing torn off at the root and other

major damage, although no serious personal injury was reported. The aircraft was under the co mmand of the respondent herein, and his airline transport rating was placed under emergency suspension by the Administrator of Civil Aeronautics from March 9th until May 7th, 1956, during most of which period respondent continued flying for Eastern as a co-pilot.

The Administrator, by his complaint filed March 735 16, 1956, initiating the present proceeding, charges that respondent, in approaching for a landing at the Owensboro Airport, violated Sections 60.12 and 40.18(a) of the Civil Air Regulations[1] and demonstrated such a lack of care, skill, judgment and responsibility required of a holder of an airline transport pilot rating, as to require that such rating be revoked for lack of qualification, or failing such revocation that respondent's airman certificate be suspended. Respondent filed an answer denying the Administrator's charges and requesting that the complaint be dismissed.

After due notice a public hearing was held before Examiner H. G. Moorhead, who delivered his initial decision orally on the record.[2] In it he found, (a) that

[1] Section 60.12 prohibits operation of an aircraft in a careless and reckless manner endangering the lives and property of others. Section 40.18 requires observance of the operation specifications of the air carrier involved and Paragraph 32 of Eastern Air Lines' operations specifications interdicts an approach more than 50 feet below the minimum descent for landing specified in the applicable form ACA-511, in this case below 450 feet above field elevation unless the aircraft has arrived at a position from which a normal approach can be made to the runway of intended landing.

[2] The initial decision was supplemented by a written order of clarification dated May 2, 1956, pertaining only to the date of expiration of the emergency suspensions theretofore imposed upon respondent.

respondent's approach to the runway of intended landing was proper in type but "marginal" in execution, in that the lateral distance of respondent's downwind leg from such runway was not sufficient to allow a margin for error, but that in view of the adverse conditions prevailing, respondent's approach represented a difficult decision which was within the regulations and within the judgment which an airline captain may exercise; (b) that, "as the result of an excessive left bank, which may have been caused by over control or some variety of stall, but also may have been caused by an air condition which was not to have been anticipated but nevertheless may have been existing in that locality, respondent 736 in recovery added power and thereafter had a right bank of the said aircraft, with the result that respondent overshot the point from which the perfect approach should have been started to Runway 5, and in the right bank failed by inches of distance and a second or less of time in completing the recovery to a point where no accident would have resulted; but that, in fact, the said aircraft struck the ground short and to the right of the runway, causing extensive damage to the said aircraft"; (c) that, since on the record as a whole there is doubt as to precisely what occurred, there is not a clear enough line to say that respondent, in deciding a difficult question of degree acted culpably; no disciplinary action is called for, but if any such action were necessary, the emergency suspension already imposed upon respondent would be adequate for this purpose; (d) that the record does not contain the necessary degree of proof to revoke respondent's airline transport rating; (e) that the public interest requires that respondent be re-examined as to his technical proficiency, judgment and skill for the rating, but that it has not been shown that respondent's attitude was in any way careless or reck-

less; and (f) that a re-examination which respondent passed at the hands of an Aviation Safety Agent of the Administrator was not of itself controlling on the matter of judgment, for approval of judgment in one test is not enough to demonstrate judgment over a period of time; but that when this test is considered together with the testimony as to respondent's judgment by Captain Clifford, for whom respondent has since been flying as a co-pilot, together with respondent's own record as a pilot, there is no further need for testing respondent's qualifications as an airline captain, and that 737 accordingly, the proceeding should be terminated.

The Administrator appeals from the Examiner's failure to find that respondent violated the Civil Air Regulations, and urges that respondent's airline transport rating should be revoked. Respondent in turn appeals (a) from the Examiner's failure to dismiss the complaint as not sustained by material, probative and reliable evidence, (b) the finding that respondent's execution of the approach was questionable or marginal with respect to the lateral separation between the downwind leg and the runway, and (c) the failure to find that when respondent passed an examination by the Administrator's agent on all maneuvers and other requirements, including judgment, all justification for the allegation that respondent was unqualified disappeared.

The Administrator's contention at the hearing, here reiterated, is that the respondent operated the aircraft during the approach for landing in such an unsafe and improper manner as to demonstrate unfitness to hold an airline transport pilot rating. The respondent, on the other hand, testified to a flight path and maneuvers of aircraft which, as described by him, was a normal, customary type of approach except for its outcome. Much of the evidence submitted by the parties in support of

their respective positions is conflicting, and the issues on appeal largely turn on the resolution of the questions of fact so raised concerning events leading up to the accident.

It is undisputed that respondent, while nearing the end of a flight from Evansville, Ind., under instrument conditions, located himself over commercial broadcast station WVJS, which is about 1.9 miles north of the Owensboro Airport, and then proceeded southward to 738 the airport on a heading of 194 degrees magnetic, breaking out underneath the overcast north of the field. At this point, having sighted the field ahead, respondent elected to land on Runway 5 (which runs to the northeast), and soon thereafter—how soon is disputed—commenced a right turn to the southwest so as to enter the downwind leg for Runway 5. The heading of respondent's downwind leg was about 250 degrees, which, in the absence of any appreciable wind, produced a flight path diverging by about 20 degrees from Runway 5, and thus gradually increased the lateral separation of the aircraft from the runway during its progess along the downwind leg. There is a major dispute as to the distance of the aircraft from the runway when it reached a point on the downwind leg abeam the runway threshold, i.e., on a line passing through the beginning of the runway at right angles to the runway direction; such distance was about a half mile according to the Administrator and almost a mile according to respondent. Within 10 seconds or less after reaching this point, respondent terminated his downwind leg and commenced a descending "U" turn to the left in order to land on Runway 5. The left turn was completed but the aircraft struck the ground at a point 330 feet short of the runway and 125 feet to the right or south of its projected centerline. The maneuvers of the airplane during the approach are also in dispute.

According to the respondent's testimony, he broke out of the clouds about a mile from the airport and at an altitude of about 550 feet on his initial approach, he made a right turn, which was completed while still 1200-1400 feet to the north of the threshold of Runway 17, and established a downwind leg on a heading of 250 degrees. He proceeded until he was more than a mile abeam of the threshold of Runway 5 and 5-10 sec-739 onds later commenced a 30 degree bank and held it until within 45 degrees of the runway heading, at which point the bank unaccountably steepened. Respondent testified that he was at an altitude of 400-450 feet at this time. He stated that with the help of the co-pilot he raised the wings to a level position and applied power. After recovery he estimated that he was at 300 feet altitude. At this point, respondent claimed to be descending on a heading of 5 degrees to the left of Runway 5 and in a normal wing level position for a landing. However, 5 to 7 seconds later the right wing dropped without warning. Respondent attempted to raise the right wing and lift the nose. While still attempting to raise the wing, ground contact occurred.

The Administrator contends that respondent's testimony was contradicted "in each of its most significant aspects by at least two of the ground or passenger witnesses". Thus, while respondent asserts that he completed his turn onto the downwind leg outside of the airport (e.g., 1200-1400 feet north of the threshold of Runway 17) two ground witnesses (Kincaid and Ayer) placed the aircraft over the airport at the time the turn was made. Moreover, respondent admitted, against interest, to CAA Agent Rinehold that he "came over the end of the north Runway [17]" and then made a right turn "into his downwind leg paralleling Runway 5". Rinehold indicated that this maneuver would bring respondent to a distance of 1800-2000

feet when abreast of the threshold of Runway 5. Ayer and Kincaid testified, from their observation of the aircraft, that it appeared to be about 2000 feet (Ayer) and 2500 feet (Kincaid) abreast of Runway 5.

Respondent challenges the credibility of Ayer and Kincaid's testimony and offers the testimony of ground witness Cox as to the normalcy of respondent's course on the downwind leg.[3] Respondent's challenge is not to the integrity of the witnesses but as to their capacity for accurate observation under the prevalent circumstances. The Examiner did not deem it necessary to resolve the apparent conflict in the testimony of the ground witnesses because he construed respondent's statement to CAA Agent Rinehold with respect to his position at the time he inaugurated his turn on the downwind leg, and the extent of that turn as an admission that he was only about one-half mile from the threshold of Runway 5 when he started his left turn for the final approach.[4] We agree with the Examiner's construction of respondent's statement, which, incidentally, is consistent with the testimony of witnesses Ayer and Kincaid as to respondent's lateral separation from Runway 5 on his downwind leg.

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With respect to the left turn after the downwind leg, respondent testified that he set up a 30° left bank and

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[3] Cox was not questioned with respect to his estimation of the lateral distance of the downwind leg from Runway 5.

[4] The Examiner did not actually find precisely where respondent commenced the turn, although he rejected respondent's testimony at the hearing as to where he was at that time. The Examiner found, in part, that while respondent's lateral separation from the runway threshold may have been in excess of respondent's one-half mile estimate "it nevertheless required more than a 30-degree bank to complete the turn" (i.e. respondent was necessarily less than 3/4 mile from the runway threshold when he started the turn).

turned without substantial loss of altitude until 45° from the runway heading, at which point the left bank unaccountably steepened. After application of power and recovery to level flight, the aircraft was at 300 feet and needed but a 5° correction to the right to make a landing. After descending with wings level for about 5-7 seconds, the right wing unaccountably dropped steeply, and before recovery could be effected the crash occurred.

The Administrator contends that this testimony is contradicted by the passenger witnesses, as well as the 741 physical marks at the scene of the crash. Passengers Saxton and Schmidt testified (a) that the airplane lost altitude throughout the left turn, and that the bank steadily increased, (b) that while in the left turn the aircraft was so close to the ground as to cause worry about striking it, and (c) that there was no period of recovery from the left bank when the aircraft stayed in level flight and that it hit the ground within 3-5 seconds from the time that it was in the steepest part of the left bank.[5] Moreover, the physical evidence refutes respondent's testimony as to his heading after recovery from the left bank. Respondent testified that his heading at this time was within 5° of the centerline; moreover, from his testimony with respect to the subsequent right bank, it would be expected that his heading would have moved closer to that of the runway before ground contact occurred. But the physical evidence, even according to respondent's own witness, shows that the aircraft's actual heading at the time of ground contact was 20° to the left of the runway heading, indicating at least a 15° differential between respondent's testimony as to his heading prior to the right bank, and his heading after the right bank at the time of contact with the ground.

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[5] This testimony is buttressed by that of ground witness Kincaid who, in effect, indicated that the airplane went down out of his sight with its left wing still down.

Counsel for respondent attacks the credibility of the passenger witnesses generally, but with specific reference to but one statement of one such witness.[6] Counsel also attempts to attribute the conflict between respondent's 742 testimony as to the aircraft's position subsequent to the allegedly sudden left bank and the physical marks on the ground to the respondent's possible confusion in the moments of crisis. However, this explanation does not square with respondent's testimony that the alleged 5° heading occurred during what he says was a 5-7 second interval of normal flight—that is during a period in which there was no crisis in the cockpit and when he thought he would be able to make a normal landing.[7]

The Examiner made no attempt to resolve the conflict in testimony; he simply concluded that the record does not show that respondent was careless or reckless on the later portion of the approach. This conclusion was apparently based upon the Examiner's view that the approach plan was proper, but that the execution of the final approach was "marginal" but not so faulty as to warrant disciplinary action, or that possibly the aircraft's altitude was affected by vagrant wind gusts. The Administrator

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[6] Respondent argues that Saxton's testimony that when respondent applied power the aircraft's nose came up to over 30° over the horizon is impossible, and from this concludes that none of the passenger testimony is credible. However, Saxton's impression as to the degree of nose high altitude may be erroneous, but it is definitely not improbable that the aircraft's nose rose over the horizon. In fact, the physical evidence of ground contact, which shows no evidence of a nose wheel impression, is perfectly consistent with the witness's observation.

[7] The reference here to the 5-7 second interval is merely to show the conflict between the respondent's testimony and his counsel's attempt to rationalize respondent's statements. Our appraisal of the record would lead us to reject the occurrence of any such interval in the approach.

challenges the conclusion that the approach plan was proper.[8] The Administrator correctly contends that none of respondent's witnesses testified that the approach could have been, or should have been made as respondent
743 described it, "if the approach and turn on to the downwind leg had been made over the field." On the contrary, their testimony requires the conclusion that the approach should not have been made as respondent described it, if the approach and turn onto the downwind leg were made over the field. Thus, the Administrator argues that the Examiner's findings fail "to give proper weight to the necessary consequence of his own finding that the left turn was commenced with only a half mile lateral separation from Runway 5" and necessarily disregards the weight of the remaining evidence as to the occurrences subsequent to the downwind leg. The Administrator properly argues that the conflict in testimony between respondent and the Administrator's witness must be resolved, since if the aircraft was flown as described by respondent, then the accident was fortuitous and he is beyond criticism—but if flown as described by the passenger and ground witnesses, then respondent attempted to land the aircraft from a position in relation to the runway that required abnormal and unsafe maneuvers of that

[8] This conclusion of the Examiner's was apparently based upon his recollection of the testimony of Eastern's chief pilot, Hudson. Hudson did testify on direct examination that an approach to Runway 5 could still be properly made if the turn to the downwind leg were made over the field, but on cross-examination he indicated that such an approach would require a downwind leg of 270° whereas respondent's testimony was that his heading on the downwind leg was only 250°. To take a heading of 270°, respondent would have had to make a turn of about 80° into his downwind leg whereas he testified to a 60° turn.

aircraft to reach that runway.[9] The Administrator suggests that the aircraft was flown in an abnormally steep descending turn in which the pilot stubbornly persisted "until the aircraft was either stalled or flown into the ground".

Respondent argues that the invalidity of the Administrator's theory that respondent was responsible for the "sudden and abnormal depression of the left wing" is demonstrated by the fact that the Adminstrator does not attempt to explain the "sudden and abnormal depression of the right wing". However, respondent is incor-
744 rect in this regard, since the Administrator relies upon Agent Rinehold's testimony:—Rinehold stated "that the 30 degree bank [respondent] used in an attempt to come to the end of the runway, didn't bring him to the end of the runway, but brought him south of the extended center line. In order to come back to the runway it was necessary to steepen the turn, and to stop that turn it was necessary to bank to the right". Moreover, if the aircraft stalled, as the Administrator suggests as an additional possibility, it could account for the dropping of the right wing. We believe that respondent's attack on the Administrator's theory is not successfully mounted.

As previously noted, the Administrator also sought to show that the accident may have resulted from an accelerated stall caused by an excessive bank and increased engine power. Respondent seeks to discount this possibility, arguing that the Martin Company expert witness testified "that from a steep bank, with the addition of power, the aircraft will have a tendency to roll out and straighten up," and that any stall would be preceded by

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[9] The Administrator also challenges the pilot's judgment in attempting to land an aircraft on a wet short runway (3700') with an approach that called for a continuous turn until just short of the runway threshold.

buffeting, of which there is no evidence. However, the record shows that Rodney, the Martin witness, testified that "if the stall was started in a steep bank, it would roll . . . if it were a co-ordinated turn it would roll level and probably possibly roll on the other way". Moreover, at least one of the passenger witnesses testified as to buffeting during the later stages of the left turn. Consequently, there is adequate evidence in the record to support a hypothesis of an accelerated stall.[10]

745 Respondent claims, in support of his own appeal, that the Examiner improperly found respondent's execution of the approach to be "marginal". Respondent asserts that the accident can be explained as having occurred during a completely normal approach as a result of the depression of the left wing, and then the right wing by an unexpected current of air from a thunderstorm in the vicinity of the aircraft. While the Examiner did not find affirmatively that the accident was caused by such a wind gust, he did hypothesize that it may have been caused by such a gust. Respondent argues that the record shows that lightning was observed "in the immediate vicinity of the aircraft" and that thunder was heard at the same time; thus indicating that there was a thunderstorm in the vicinity, that currents of airs in and about a thunderstorm are "best described as chaotic"; that a thunderstorm may send out fingers of air currents of considerable velocity, "vertical and horizontal" which may never reach the ground; and that such a current of air may have caused the left wing of the aircraft to be "depressed suddenly", and may have simi-

[10] Respondent also testified to the fact that after the left wing dropped, he increased the power setting to 38-39 inches, which is cruise climb power, substantially in excess of normal approach power for a Martin 404. Use of such a power setting is also consistent with the accelerated stall theory.

larly later affected the right wing immediately prior to the crash.

However, we do not believe that respondent would escape responsibility, even if the wind gust theory were credible, since it seems clear from the physical evidence as to the aircraft's position and heading[11] at the time of the impact, that a reasonably prudent pilot would have realized in time to execute a missed approach procedure, that the aircraft was not in a position to make a safe landing.

746 Under the existing physical conditions, a safe landing on Runway 5 (3700′) in a Martin 404 at the probable landing weight[12] of respondent's aircraft (about 41,000 lbs.) would at best require an almost immediate touchdown at the approach end of the runway.[13] It is clear, however, from the aforementioned physical evidence that the aircraft had not been maneuvered into a position where such a touchdown could have been effected without the performance of acrobatic maneuvers. This fact should have become clear to respondent sufficiently prior to ground contact to have permitted him to effect a missed approach procedure. Consequently, it must be concluded that, re-

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[11] As previously noted, the aircraft's heading was 20° to the left of the projected centerline, and at the time of ground contact it was 330 feet short of the runway and 125 feet to the right of the projected centerline.

[12] Based upon the reported take-off weight of the aircraft 17 minutes earlier and assuming standard gasoline consumption.

[13] According to the CAA Approved Airplane Flight Manual for Eastern Air Lines' Martin 404, in order to properly dispatch an aircraft with an expected landing weight of 41,000 lbs. to a point at the elevation of the Owensboro Airport there would have to be a runway at least 3800′ in length. These calculations allow an approximate 40 percent safety margin over the absolute minimum landing distance assuming a standard approach and a dry runway. This margin is appreciably reduced where, as in the instant case, the runway is wet.

gardless of any possible wind gust explanation for the excessive left bank, the respondent should have executed a missed approach procedure upon recovery therefrom instead of persisting in his efforts to accomplish a landing and his failure to do so can only be described as careless.

But in any case, after careful scrutiny of the record, we believe that the wind gust theory, while not without some evidentiary support, should be rejected as a possible explanation of the cause of the accident. In order to give credence to the wind gust theory, it is necessary to accept respondent's statement that he was in a normal bank when the left wing was suddenly depressed and to reject the contrary testimony of the passenger witnesses heretofore referred to with respect to that bank (e.g. that 747 the bank gradually increased as the turn progressed).

Moreover, it is also necessary to reject the conclusion, which we have already indicated is sound, that respondent's downwind leg did not leave him with sufficient distance from the threshold of the runway for a normal approach, so that an abnormally steep bank was required to approach the runway. In short, acceptance of the wind gust theory requires that the bulk of the Administrator's evidence be discounted, if not completely disregarded. This, we believe, may not properly be done unless the record contained substantial evidence as to the possibility that wind gusts did affect the aircraft's altitude. But on this matter the record is most tenuous. In the first place, respondent himself testified that there had been no wind buffeting during the approach, and that he had not been aware of any lighting or thunderstorm in the aircraft's vicinity, which would be the normal thing had there actually been such a storm near there.[4] Further-

[4] Thunderstorms were not forecast for, or reported in the Owensboro area by weather observers or pilots at any time during the day of the accident. None of the passengers were questioned by the parties as to their observations as to weather during the approach.

more, the ground witnesses at the airport testified that it had been raining steadily without wind gusts or much wind of any kind all day, again conditions which are inconsistent with the probability of thunderstorms in the Owensboro area. As heretofore noted, the only evidence of a storm in the aircraft's vicinity comes from ground witnesses who testified to having seen lightning in the southwest and heard thunder at the moment the aircraft crashed. While the witnesses said that the lightning appeared to be in the aircraft's vicinity, one of them also pointed out that it appeared to be beyond the aircraft.

748 The record indicates that there were reported thunderstorms southwest of Owensboro in the direction from which the final approach was being made, and it is probable that the lightning observed came from such storms rather than from one in the near vicinity of Owensboro. It is an obvious optical illusion to juxtapose two objects in the same general direction which are observed at a distance even where there may have been considerable space between them. Finally, if it is assumed that there was no thunderstorm in the immediate vicinity of the aircraft, it is improbable that there could have occurred, under the reported weather conditions, any wind gusts of sufficient velocity of force to have affected the aircraft's attitude. Accordingly, we believe that the wind gust theory is without substantial support in the record, and is heavily outweighed by evidence to the contrary.

As the discussion heretofore indicates, the record viewed as a whole warrant acceptance of the Administrator's contention as to how the accident occurred. There remains the question of whether, rejecting the respondent's testimony and explanation of the causation of the accident, and accepting the Administrator's view, there has been demonstrated a course of action by the respondent which violates the standard of care to be properly expected of

an airline pilot, and is thereby "careless and reckless" within the meaning of Section 60.12 of the Civil Air Regulations. In this connection, attention is invited to Section 601(b) of the Act which specifically adjures the Board in carrying out its air safety responsibilities "to give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest." The Board 749 has, consistent with this standard, insisted upon "the highest degree of care on the part of those who sit at the controls of the airliners that carry the traveling public."[15] It is our view that respondent's approach cannot be consistent with "the highest degree of care". The record necessarily requires the conclusion that respondent's willingness to accept risks to his own and his passengers' and crew's lives is at the very least properly described as careless [16] and violative of the requirements of Section 60.12 of the Civil Air Regulations.[17]

We turn now to the consideration of the proper sanction to be imposed. The Administrator contends that "only revocation of respondent's air transport rating is appropriate * * * a captain who flies his aircraft to destruction under the conditions established by the evidence in this record cannot be left with command authority if the public is to be protected." The Administrator argues that "the type of failure here portrayed cannot be offset by the accumulation of several thousand hours of time in an aircraft." The Administrator states that revocation of

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[15] E. g. *Stead et al., Airman Certificates*, 1 C.A.B. 74, 84-5 (1939).

[16] *Compare Kuhn, Airman Certificate*, 13 C.A.B. 139, 142, 143.

[17] Since the violation of Section 60.12 which we have found is sufficient to sustain the sanction we are ordering, we need not consider further whether respondent's actions violated the other provisions of the regulations as charged.

respondent's air transport rating would not exclude respondent from aviation or deprive him of his livelihood, since he can continue to fly as co-pilot, but it will "place in other hands the responsibility for the safety of passengers."

We agree with the Administrator that disciplinary 750 action is called for in this case, and that the Board could not, by failure to impose a sanction, tacitly condone a course of action which, even if no accident had resulted, would have brought an aircraft to within inches of disaster. On the other hand, we question whether respondent's conduct on this flight was so egregious as to require revocation in the public interest, when we consider his eleven year record as a captain for Eastern and over 8,000 hours of flying experience without a previous incident of this type, or any disciplinary action for violations of safety rules. This does not mean that a single violation by an experienced pilot cannot ever call for revocation of his rating, for in flagrant cases the Board has ordered revocation. But on the facts here involved, we believe that the carelessness shown is not so egregious as to point to the ultimate sanction of revocation. In our judgment, the accident itself, together with a substantial suspension of his airline transport rating, would provide a sufficient deterrent against respondent or other pilots taking similar risks with their passengers' lives.[18]

Accordingly, we find a six month suspension should be imposed upon respondent, that he should be given credit against such period for the 60 days for which his certificate has already been suspended by the Administrator's

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[18] In view of our decision to suspend rather than revoke respondent's certificate, respondent's contentions with respect to his requalification through re-examination are moot. Compare *Administrator* v. *Clark*, Order No. SA-735, dated May 10, 1956.

emergency action, and that he be required to take an
751 appropriate flight check given by the Administrator prior to again exercising the privileges of his airline transport rating.

An appropriate order will be entered.

Durfee, Chairman, Gurney, Denny and Minetti, Members of the Board, concurred in the above opinion.

752 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

* * (Caption—Docket No. SR-2210) * *

ORDER.

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing it findings, conclusions and decision, which is attached hereto and made a part hereof;

It Is Ordered:

1. That Respondent's appeal from the Intitial Decision be, and it hereby is denied;

2. That the Complainant's appeal from the Initial Decision be granted, and the Examiner's order of April 28, 1956, be and it hereby is vacated;

3. That Respondent's airline transport rating be, and it hereby is suspended for a period of four months, effective twenty days after the date of this order.

By the Civil Aeronauties Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(Seal)

759 UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
Washington, D. C.

* * (Caption—Docket No. SR-2210) * *

ORDER.

On February 20, 1957, respondent in the above-entitled proceeding filed a motion requesting a stay of Order No. S-779, dated February 6, 1957, which ordered respondent's airline transport rating suspended for a four month period effective February 26, 1957. Respondent asserts that additional time is needed in order to determine whether it would be in his interest to file a petition for judicial review or for reconsideration or modification of the Board's decision.

Upon consideration of the matters submitted on behalf of respondent, the Board has determined to stay the suspension provision of its order for the period provided for filing of a petition for reconsideration under Rule 301.34 of the Board's Rules of Practice in Air Safety Proceedings.

Therefore, It Is Ordered:

1. That the suspension ordered by paragraph 3 of Order No. S-779, dated February 6, 1957, be and it is stayed until March 11, 1957; Provided, That if respondent shall timely file a petition requesting rehearing, reargument, reconsideration or modification pursuant to Rule 301.34 of the Board's Rules of Practice in Air Safety Proceedings, such suspension shall be stayed pending final disposition of the petition so filed;

2. That, except as hereinabove granted, the motion filed February 20, 1957, be and hereby is denied.

By the Civil Aernonautics Board:

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(Seal)